

***Real Estate and Land Use* Hotsheet --
Breaking Developments in Real Estate and Land Use
Law**

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**Court of Appeals Decision Addresses Standards for Compliance
With Notice and Claims Procedures for Construction Contracts**

Are cracks beginning to appear in the doctrine of strict compliance with construction notice and claims procedures? Last week's decision by the Washington Court of Appeals (Division II) suggests that the three year old rule laid out by the Washington Supreme Court in the *Mike M. Johnson, Inc., v. Spokane County* case may not be the last word on the strict compliance standard. In that case, a contractor who was awarded bids to construct two sewer projects for the County had to stop work when it encountered buried telephone lines. The County contract set specific deadlines for notice, protest, and claims for additional time; however, the contractor did not follow them and instead wrote letters to the County addressing its concerns. In a subsequent lawsuit, the contractor claimed that the County's notice of the claims constituted a waiver of the contract requirements. The Washington Supreme Court rejected this argument, holding that "actual notice" was not an exception to contract compliance and that the County had not waived compliance by the contractor. This holding sparked bills in the Washington legislature aimed at overturning the decision, although none were passed.

The Washington Court of Appeals' (Division II) recent decision in *American Safety Casualty Insurance Company v. City of Olympia*, increases the burden on the owners wishing to enforce the strict standards for compliance with notice and claims procedures exemplified in *Mike M. Johnson*.

The American Safety Case Distinguished from Mike M. Johnson

In *American Safety Casualty Insurance Company v. City of Olympia*, American Safety Casualty Insurance Company ("American Safety"), acted as a surety for Katspan, a general contractor who entered into a contract with the City of Olympia to complete a public works construction project. Before Katspan completed the project it became insolvent and assigned all its rights under the contract to American Safety. The contract between the City and Katspan set out a specific claims procedure schedule, which the City argued Katspan did not meet. American Safety sought an equitable adjustment from the City for delays that caused extra costs to

Katspan; however, the request did not follow the specific requirements in the contract. After the City repeatedly informed American Safety that it would not negotiate a claim that had inadequate “backup information,” American Safety sued the City. The City counterclaimed and moved for summary judgment, alleging that Katspan breached its contract with the City when it failed to timely complete the work on the project.

The trial court granted summary judgment because American Safety did not demonstrate that the City waived any of its rights under the contract through an unequivocal, clear waiver.

The Court of Appeals reversed and held there is a question of fact as to whether the City waived its contractual claims procedures. Among the reasons given by the Court of Appeals were:

1. The City did not consistently refer to strict compliance with the contract terms, and wrote letters stating it (a) reserves its right to demand strict compliance with all *other* terms of the contract, and (b) that the City did not believe it received proper notification from Katspan under the protest requirements.
2. The City stated several times that the project manager was willing to negotiate the claims in order to come to a quick resolution, and continuously asked American Safety to provide more information.
3. The City could have halted communication with American Safety, only detrimentally affecting American Safety, unlike in *Mike M. Johnson*, where the County’s termination of communication would have detrimentally impacted both parties.
4. The City’s continued requests for information, references to future litigation, and its new deadline for production well beyond the contract limitations period create different inferences about whether the City waived the contract terms, thus making summary judgment in favor of the City improper.
5. The City’s consultant who exchanged e-mails with American Safety indicating he would discuss the matter is part of the totality of the circumstances that the court must consider in deciding whether the City implicitly waived strict enforcement of the contract.

What This Means for Construction Contracts

The Court in *American Safety* distinguished *Mike M. Johnson* because of the equivocal actions of the City of Olympia regarding the contractual notice provisions. Owners (and consultants who assist them) who desire to strictly enforce contractual notice and claims provisions should clearly communicate that intention. Time will tell if the American Safety case becomes a vehicle for the State Supreme Court to revisit its *Mike M. Johnson* decision.

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